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DEC 11 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC.,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

R. J. VENABLES,
DONALD G. GRAHAM,
JAMES B. HOWE,
Counsel for Appellant.

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No. 628

FISHER'S BLEND STATION, INC., A CORPORATION,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON AND THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF SAID COMMISSION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, appellant submits this statement showing that the appeal in the above entitled cause is properly before this Court.

Opinions Below.

The opinion of the Supreme Court of the State of Washington, reported at this time in Advance Sheets, Washington Decisions, Vol. 82, No. 3 published at Olympia, Wash-

ington, on June 5, 1935, at page 123, and in Vol. 84, No. 3, of said Washington Decisions published October 30, 1935, at page 91. Said opinions were filed on May 27, 1935, and October 17, 1935, respectively (R. 30-46). Petition for Rehearing was filed by appellant on July 13, 1935, and was denied on September 13, 1935 (R. 47). Judgment was entered on October 19, 1935 (R. 48).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the U. S. Judicial Code, as amended by the acts of February 13, 1925, January 31, 1928, and April 26, 1928; Title 28 U. S. C., Sections 344 (a), 861 (a) and 861 (b).

(1)

APPEAL TIMELY TAKEN.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered on October 19, 1935 (R. 48). The time for taking the appeal began to run on the date of such judgment. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.) A Petition for Appeal accompanied by Assignments of Error and Statement as to Jurisdiction required by Rule 12 (1) of the Supreme Court of the United States, was on the 26th day of November, 1935, presented to the Honorable William J. Millard, Chief Justice of the Supreme Court of the State of Washington, and by him allowed on the 26th day of November, 1935 (R. 49).

(2)

FINALITY OF JUDGMENT.

The judgment forming the basis of the appeal is a final judgment in the sense that it determines the controversy,

leaving nothing to be done except the ministerial act of enforcement. It is one denying plaintiff any relief and dismissing the action. The Trial Court had entered a final judgment upon the merits (R. 26). The judgment appealed from is final within the meaning of Section 237, Judicial Code.

Mower v. *Fletcher*, 114 U. S. 127;
Board of Commissioners of Tippecanoe County v. *Lucas, Treasurer*, 93 U. S. 108;
Gulf Refining Co. v. *United States*, 269 U. S. 125.

(3)

JUDGMENT OF THE HIGHEST COURT.

The judgment of the Supreme Court of the State of Washington is that of the highest Court in which, under the laws of the State, such judgment could be had. No further appeal may be had to it or any other court, save the Supreme Court of the United States, hence the appeal herein is taken from "a highest court of a State in which a decision in the suit could be had."

Constitution of the State of Washington, Article IV., Sections 1, 4 and 6, found in Remington's Compiled Statutes of the State of Washington, 1922, Volume 1, pages 75, 77 and 79 respectively.
Remington's Compiled Statutes of Washington, 1922, Vol. 1, Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 926; and Section 1741, page 926.

(4)

VALIDITY OF A STATE STATUTE DRAWN INTO QUESTION AND DECISION IN FAVOR OF ITS VALIDITY

In this suit appellant contended in the Court below that a State statute, as applied to appellant, was repugnant to

and in conflict with Section 8, Article I of the Constitution of the United States, which states that Congress shall have power "* * * to regulate Commerce with foreign nations and among the several States and with the Indian tribes * * *," and the decision of said Supreme Court of the State of Washington was in favor of the validity of the statute.

(*a*) *Statute.*

The statute, the validity of which was drawn into question, is the Occupation Tax Act of the State of Washington embodied in Chapter 191, Laws of 1933, State of Washington, being Sections 8326-1 to 8326-30 inclusive, of Remington's Compiled Statutes of Washington.

Said Act states in Section 2, Subdivision 2 thereof:

> "From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:
>
> * * * * * * *
>
> "(ed) Upon every person engaging in or continuing within this State in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent."

Section 3:

> "If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from

the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

The terms "person," "gross income" and "business" are defined in Section 1, Subdivision 4, 6 and 7 respectively thereof as follows:

"(4) The word 'person' or the word 'company,' herein used interchangeably, shall mean and include any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

"(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; Provided, the term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

"(7) The word 'business' shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in taxable in the class in which it falls."

Section 6 of said Act requires persons engaged in the business of radio broadcasting to make monthly reports and monthly payments of the tax, said reports to set forth the gross income of such persons; penalties are imposed for failure to make such reports or payments as follows:

1. 10% of the assessed tax to be added as a penalty (Sec. 10).

2. 1% per month of the amount of the tax to be added until paid (Sec. 10).

3. Appellee may order the Sheriff of any county to levy upon all real and personal property of such persons for the payment of the tax (Sec. 15).

4. Appellees may instruct the Attorney General of the State of Washington to restrain Appellant from engaging or continuing in the business of radio broadcasting until the tax assessed is paid (Sec. 17).

5. It is unlawful for Appellant to fail or refuse to make said returns and in the event such returns are not made Appellant will be guilty of a gross misdemeanor and punishable in the manner provided by the laws of the State of Washington, to-wit: by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars or both (Sec. 23 and Remington's Compiled Statutes, Sec. 2267).

6. Appellees have the power to summon any person to testify as to any information which they might require with reference to the imposition of the tax, and, upon refusal to obey such summons, such person may be punished for contempt of court (Sec. 23).

Section 13 of said Act states that an injunction or restraining order may issue to restrain and enjoin the collec-

tion of any tax or penalty imposed thereunder or any part thereof, upon the ground that the assessment thereof is in violation of the Constitution of the United States or of the State of Washington.

The tax levied under the Act is an excise tax, not a property tax. Its purpose is to raise revenue. It was not imposed by the legislature in the exercise of its police power.

Paramount Pictures Distributing Co. v. *Henneford* decided by the Supreme Court of the State of Washington November 12, 1935, Vol. 84 Washington Decisions 308.

(b) Application of the Statute or Nature of the Case.

This is a suit by Appellant, as Plaintiff, against the Tax Commission of the State of Washington, which by law is vested with the administration of the Occupation Tax Act and with the assessment and collection of the taxes and penalties imposed thereunder, to enjoin the collection of any taxes under the Act from the Plaintiff. The grounds for the action are stated in part in paragraph XI of Plaintiff's Complaint, as follows:

> "That plaintiff while engaging or continuing in the business of radio broadcasting, as hereinabove described, is engaged solely in foreign and interstate commerce and that the operation of the Occupational Tax Act, insofar as this plaintiff is concerned, constitutes a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce which amounts to a regulation and direct burden thereon and, therefore, is repugnant to, in conflict with and contravenes Section 8, Article I of the Constitution of the United States, which states that Congress shall have power '• • • to regulate commerce with foreign nations and among the several states and with the Indian tribes • • •,'"

Appellees' demurrer to the complaint, as amended, was overruled and upon stipulation of the parties the cause was submitted to the court for final determination, upon the allegations of the complaint as an agreed statement of facts (R. 26). The Trial Court entered its decree permanently enjoining appellees from enforcing the Act against appellant (R. 26).

It is alleged in the complaint that appellant owns radio station KOMO and leases, as lessee, radio station KJR, both located in Seattle, Washington; that appellant is engaged in the business of radio broadcasting by virtue of its operation of said stations pursuant to licenses issued to it by the Federal Radio Commission, copies of which licenses are annexed to the complaint, marked Exhibits A and B, and which licenses provide that said stations shall not be operated by others without the written consent of the Federal Radio Commission (R. 3, 16, 18); that appellant's business of radio broadcasting consists of transmitting radio programs from said stations through space to numerous radio receiving sets, by converting said programs by electricity into electro-magnetic waves which move through the ether and are detected by such receiving sets and amplified into audible sound; that it is impossible to confine such waves within state lines, and that all radio communications, anywhere in the United States, travel actually or potentially across state lines (R. 4); that appellant's station KJR is a so-called clear channel station and, as such, designed, licensed and assigned sufficient power for the effective transmission of radio broadcasting over the entire area of the United States and that radio station KOMO is a so-called regional station and, as such, designed, licensed and assigned sufficient power for the effective transmission of radio broadcasting over the entire area of the so-called Fifth Zone which embraces the states

and territories of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Hawaii and Alaska (R. 5); that in truth and in fact said stations have been and now are engaged in broadcasting in said manner and that said broadcasting has covered said designated areas and also certain parts of the high seas adjacent thereto and certain parts of the Dominion of Canada, particularly the Province of British Columbia (R. 6); that such stations are links in a system of national and Pacific Coast broadcasting in that they relay the national and Pacific Coast broadcasts of the National Broadcasting Company, Inc., a corporation engaged in the business of broadcasting radio programs over the entire United States (R. 6); that the gross income of appellant from its radio broadcasting business consists of payments made to it by the National Broadcasting Company, Inc., for the broadcasting of national and Pacific Coast programs as aforesaid, and payments made to appellant by commercial advertisers, who desire to reach the listening public in the areas above mentioned, for broadcasting programs originating at appellant's stations or at stations situated in other states and connected by wire with appellant's stations (R. 7); that a large number of persons, many of whom reside outside of the State of Washington, but a substantial portion of whom reside within the State of Washington, listen to the program broadcast by appellant from its stations (R. —). *All of these allegations of the complaint are admitted.*

(c) Constitutional Question Timely and Sufficiently Raised.

The constitutionality of the Statute was drawn into question by appropriate allegations in paragraph XI of the complaint, quoted above. The question was expressly de-

cided by the State Supreme Court as shown by the following quotations from the Opinion of the Supreme Court:

> "Respondent contends that it is engaged solely in interstate commerce, and that a tax upon the gross receipts derived from radio broadcasting amounts to a tax upon interstate commerce and cannot be collected, the same being in contravention of the commerce clause of the Constitution of the United States."
>
> * * * * * * *
>
> "Respondent does not question any tax levied by the State of Washington upon its tangible property, but contends that, by seeking to collect a tax based upon the gross revenue which it receives from its broadcasting station, the State is laying a burden upon interstate commerce and seeking to exact a payment which it has no right to demand."
>
> * * * * * * *
>
> "* * * respondent relying solely upon the proposition that the tax to which it objects is a burden upon interstate commerce.
>
> * * * * * * *
>
> "If it be that the tax does affect interstate commerce, it does so merely incidentally, and does not constitute a burden thereon to such an extent as to require a holding that the tax is void as to respondent as obnoxious to the commerce clause of the Federal constitution."
>
> "Millard, C. J. (dissenting): I am convinced that radio broadcasting is interstate commerce. Therefore the State may not levy an occupation tax against respondent. The judgment should be affirmed."

Furthermore, the State Supreme Court in its opinion cites the following cases in determining whether this tax

constitutes a burden on interstate commerce, in violation of the commerce clause:

Federal Compress, etc. Co. v. *McLean,* 291 U. S. 17;
Edelman v. *Boeing Air Transport Inc.,* 289 U. S. 249;
Hall v. *Geiger-Jones Co.,* 242 U. S. 539;
U. S. Fidelity & Guaranty Co. v. *Kentucky,* 231 U. S. 394;
Utah Power & Light Co. v. *Pfost,* 286 U. S. 165;
East Ohio Gas Co. v. *Tax Commission,* 283 U. S. 465;
Ozark Pipe Line Corporation v. *Monier,* 266 U. S. 555;
Henderson Bridge Co. v. *Kentucky,* 166 U. S. 150;
Detroit International Bridge Co. v. *Corporation Tax Appeal Board,* 79 Sup. Ct. Adv. Opinions 337;
Sprout v. *City of South Bend,* 277 U. S. 163.

All of these cases have to do with the constitutionality of State statutes in respect to the Constitution of the United States.

The opinion and judgment which the Supreme Court rendered and entered could not have been rendered or entered without denying to appellant all of the rights asserted by it under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Section 237 of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this Court.

North Carolina Ry. Co. v. *Zachary,* 232 U. S. 248;
Mallinckrodt Chemical Works v. *Missouri,* 238 U. S. 41;
Great Northern Ry. Co. v. *State of Minnesota,* 278 U. S. 503;

King Mfg. Co. v. *City Council of Augusta,* 277 U. S. 100;
Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135;
Bryant v. *Zimmerman,* 278 U. S. 63, 67;
Puget Sound Power & Light Co. v. *City of Seattle,* 291 U. S. 300;
Weston v. *City Council of Charleston,* 27 U. S. 449, 2 Pet. 449.

Dated the 26th day of November, 1935.

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